

90-6616

NO. 8

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

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JAMES R. STRINGER,

Petitioner

v.

LEE ROY BLACK, COMMISSIONER  
MISSISSIPPI DEPARTMENT OF CORRECTIONS, )

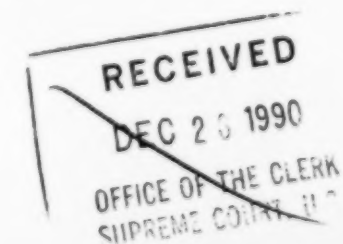
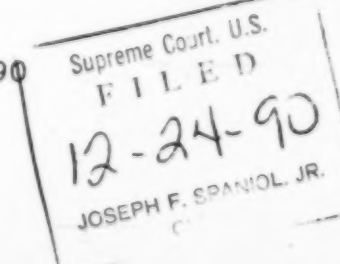
Respondent

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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December 24, 1990



5104

QUESTIONS PRESENTED

1. Did the court below disregard this Court's remand instruction to reconsider this case in light of Clemons v. Mississippi by applying a state rule of automatic affirmance that this Court found did not clearly exist in Clemons?
2. Can a federal court avoid granting relief from an unconstitutional death sentence by invoking a state "harmless error" rule (1) that was not imposed by the state courts, and (2) that is plainly unconstitutional under Clemons v. Mississippi, and Chapman v. California, 386 U.S. 18 (1967)?
3. Were Clemons v. Mississippi and Maynard v. Cartwright dictated by precedent, such that they cannot be considered "new rules" under Teague v. Lane?
4. Is the requirement of limited sentencing discretion a bedrock procedural element essential to the fairness of a capital sentencing proceeding?
5. Where the State deliberately waives the defense of nonretroactivity in one federal court forum, should it be permitted to raise this defense in the next?

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No.  
IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1990

JAMES R. STRINGER

PETITIONER

VS.

LEE ROY BLACK, Commissioner  
Mississippi Department of Corrections

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Petitioner, James R. Stringer, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Fifth Circuit in Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). Petitioner is currently under sentence of death in the State of Mississippi.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on July 30, 1990, is reported at Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). A copy of the opinion is attached as Appendix A.

The majority and dissenting opinion of the United States Court of Appeals for the Fifth Circuit rendered in 1988 is officially reported at Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), and is attached as Appendix B.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1), Petitioner, having asserted below, in the Fifth Circuit Court of Appeals, and continuing to assert in this Court the deprivation of rights secured by the United States Constitution, as delineated in the Petition for Writ of Certiorari.

The judgment and opinion of the Fifth Circuit was rendered on July 30, 1990. The Petition for Rehearing was denied by the Fifth Circuit on September 10, 1990. The time for filing a petition for writ of certiorari was extended fifteen (15) days, to and including December 24th, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

a. The Eighth Amendment to the United States Constitution, which provides in pertinent part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

b. The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

James Stringer was convicted of capital murder in the Circuit Court of Hinds County and sentenced to death. The Mississippi Supreme Court affirmed on direct appeal, Stringer v. State, 454 So.2d 468 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985) and denied a petition for post-conviction relief, Stringer v. State, 485 So.2d 274 (Miss. 1986). A Petition for Writ of Habeas Corpus filed with the United States District Court for the Southern District of Mississippi was denied. Stringer v. Scroggy, 675 F.Supp. 356 (S.D. Miss. 1987). The United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), reh. denied 866 F.2d 1417 (1989). This Court granted certiorari and vacated the decision below, and remanded the case for further consideration in light of Clemons v. Mississippi, 494 U.S. \_\_\_, 110 S.Ct. 1441 (1990). Stringer v. Black, \_\_\_ U.S. \_\_\_, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990). The Fifth Circuit reinstated its previous judgment, again affirming the judgment of the district court. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). A timely petition for rehearing was denied on September 10, 1990.

#### B. Statement of the Facts

In the summer of 1982, James Stringer was fifty years old. He had been married to the same wife for 26 years and had four children (T-1131). James had a ninth grade education in Mississippi schools (T-1131-32). At a young age, James volunteered for service in the United States Army during the Korean War. He was decorated for heroism during the war, having served in one of

the most front-line regiments of the Army (T-1132). He reenlisted in the Army, and served his country in that capacity for a total of seven years (T-1132). Upon returning to civilian life, he established himself as a businessman in Jackson, Mississippi, and lived there from 1961 until his arrest in 1982 (T-1132; 1138-39). In his gold and silver business located in downtown Jackson, he had himself been the victim of armed robberies on many occasions (T-1138-39).

In 1979, James Stringer's niece was murdered (T-1135). The effect of this event on James' life was more fully documented in post-conviction proceedings, where several witnesses attested that James was devastated by the murder. He attempted to investigate the murder by himself as a means of coping with this trauma, and during this effort found himself in several fights which resulted in misdemeanor convictions (T-1135). Prior to his capital murder conviction, he had no significant history of prior criminal activity.

At the time of his arrest in 1982, James Stringer was suffering from a combination of hand and back injuries, and his medical bills of at least ten to fifteen thousand dollars placed him under considerable financial duress (T-1141-42).

On June 21, 1982, Mr. and Mrs. McWilliams were discovered in their home, dead of gunshot wounds. Police eventually arrested Mike Meddars and Rhonda Brock, after Meddars had been picked up in another part of the state for assaulting Brock. Meddars admitted his and Brock's involvement in the murders in Jackson, and after

cutting a deal with the police which protected him and Brock from the gas chamber, blamed James Stringer, James' son Jimbo Stringer, and John Mack Parker for actually committing the murders in the course of a robbery attempt.

The State's theory, presented at trial almost exclusively through the testimony of coindictes Brock and Meddars, was that James Stringer planned the crime and led the others in a robbery of Ray McWilliams because Stringer knew McWilliams carried large amounts of cash and dealt in gold and silver at Stringer's exchange. In fact, the plan was worked out by the group; in Meddars' words, the planning was "among talking and one said this and one said this. You know, just talking about it." (T-717). During the planning, the group was drinking heavily and smoking marijuana; James Stringer was the most intoxicated of the group, according to Meddars. (T-729). Meddars drove the group past the house before the robbery to assist the planning. The plan was for Stringer and Brock to go to the McWilliams' home at night and get invited inside on the pretext that Brock needed cash in a hurry and was willing to sell jewelry that she supposedly had. Once they were inside, Ray McWilliams would be forced to tell the robbers where he kept his cash. After the robbery, the plan was to cut the victims' throats so as to avoid gunshots, because they "all knew" that a policeman lived nearby. (T-719). Meddars drove the car used in the crime, and provided the bandanna which was to be used to wipe fingerprints. (T-720).

The plan went badly. According to Brock, Ray McWilliams got

into a struggle with James Stringer. Mack Parker then put a pistol to McWilliams head and said "you are a dead man", pulling the trigger and killing McWilliams with a single gun shot. Mrs. McWilliams came into the kitchen, and Jimbo shot her in the back of the head, killing her instantly. According to witnesses, between the sound of the first shot and the sound of the last, only 8 to 10 seconds elapsed. (T-468). The five hastily left the home without taking anything and drove off in Meddar's car. James Stringer was unaware that Mrs. McWilliams had been killed until the group was back in the car and driving off.

Mississippi's sentencing scheme requires jurors to find that aggravating circumstances are not outweighed by mitigating circumstances before imposing a sentence of death. The jury is required to specify aggravating circumstances, but not mitigating circumstances. James Stringer's jury was instructed that it must unanimously find mitigating circumstances before considering them in the balancing process.

The trial judge permitted the jury, over defense objections, to consider three statutory aggravating circumstances. First, that the Defendant was engaged in an attempt to commit a robbery and the capital murder was committed for pecuniary gain. Second, that the capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of the defendant.

Finally, the jury was permitted to consider the aggravating circumstance that the capital murder was "especially heinous, atrocious or cruel". The jury was not given any guidance by the



trial judge as to what that phrase meant.

The prosecutor vigorously argued as the primary justification for imposing the death sentence on James Stringer the fact that the crime was especially heinous, atrocious and cruel. In this regard, the prosecutor showed photographic slides of the crime to the jury describing in detail the facts of the murders and asked the jurors, "Is that atrocious? Is that cruel?" (T-1370-71, 1373-74, 1377-78).

The jury returned a verdict of death after finding each of the three aggravating circumstances.

Mike Meddars, who drove the car, carried a .38 pistol, provided the bandanna and suggested the knife as a means of murdering Mr. and Mrs. McWilliams, got a twenty year sentence for manslaughter for his testimony. Rhonda Brock, who carried a .25 automatic pistol (T-730), who went with James Stringer to the door of the McWilliams' house and tried to trick her way into the house to commit the robbery and murder, also received a twenty year sentence under her plea agreement. John Mack Parker, who shot and killed Ray McWilliams, pled guilty and received a life sentence. Jimbo Stringer, who shot and killed Nell McWilliams with a shotgun, was tried, convicted, and sentenced to life in prison by a jury. He also was tried for his part in the murder of Ray McWilliams, and ended up with a negotiated life sentence in that case. Thus, of the original group accused by Meddars and Brock, James Stringer is the only one on death row.

#### REASONS FOR GRANTING THE WRIT

#### INTRODUCTION

James Stringer's capital jury was allowed to consider and rely upon the undefined aggravating circumstance that the capital murder was "especially heinous, atrocious, or cruel." The instruction violated the Eighth Amendment, because it failed to narrowly guide the jury's discretion. See Godfrey v. Georgia, 446 U.S. 420 (1980) and Maynard v. Cartwright, 486 U.S. 356 (1988).

The Mississippi Supreme Court did not find Stringer's instructions to have violated the Eighth Amendment, as interpreted in Godfrey. Stringer v. State, 454 So.2d 468, 479 (Miss. 1984). Finding no error, it performed no harmless error analysis. Nor did it invoke any state procedure that might "cure" such an error. In particular, the state supreme court: (i) never applied any standard of review to determine whether resentencing was required in light of the use of the especially heinous, atrocious or cruel aggravating circumstance; (ii) did not reweigh valid aggravating circumstances against the considerable mitigation set forth above; and (iii) never applied a state "harmless error rule" which automatically affirmed sentences of death where one aggravating circumstance was found to be unconstitutional, but other valid aggravating circumstances remained.

The United States Court of Appeals for the Fifth Circuit found the trial court's instruction regarding the "especially heinous, atrocious, or cruel" aggravating circumstance to be invalid. Stringer v. Jackson, 862 F.2d 1108, 1113 (5th Cir. 1988). The Fifth



Circuit nevertheless applied what it conceived to be a rule in Mississippi allowing "automatic affirmance", and therefore upheld James Stringer's sentence of death. Stringer v. Jackson, 862 F.2d at 1113-1115. According to the Fifth Circuit, Mississippi had a rule that automatically upheld death sentences in the face of an unconstitutional aggravating circumstance as long as at least one valid aggravating circumstance was found by the jury to exist. Id., at 1115. This Court vacated the Fifth Circuit's opinion, remanding the case for further consideration in light of Clemons v. Mississippi, 494 U.S. \_\_\_, 110 S.Ct. 1441 (1990). Stringer v. Black, \_\_\_ U.S. \_\_\_, 110 S.Ct. 1800 (1990).

The Fifth Circuit chose not to apply Clemons on remand. Instead, it stood by its earlier decision to affirm James Stringer's sentence, on the theory that Mississippi once had a practice automatically affirming death sentences tainted by an unconstitutional aggravating circumstance. Relying upon Smith v. Black, 904 F.2d 950 (5th Cir. 1990), that Court held Clemons v. Mississippi and Maynard v. Cartwright, 486 U.S. 356 (1988)<sup>1</sup> to be nonretroactive to a petitioner whose conviction was final "prior

<sup>1</sup> The Fifth Circuit panel in Smith v. Black expressly left open the question of whether Cartwright should be retroactively applied to cases in post-conviction proceedings. Smith, 904 F.2d, at 983. Nevertheless, the panel in Stringer mistakenly invoked Smith for the proposition that Clemons and Cartwright should not be retroactively applied. More recently, another panel of the Fifth Circuit relied on Smith only for the proposition that Clemons was nonretroactive, without reaching the question of whether Cartwright was nonretroactive to cases in post-conviction proceedings. Hill v. Black, \_\_\_ F.2d \_\_\_, No. 87-4922 (5th Cir. December 14, 1990).

to these decisions." Stringer v. Black, 909 F.2d 111 (5th Cir. 1990).

The Fifth Circuit wrongly held Cartwright nonretroactive. Further, on remand from the United States Supreme Court, the Fifth Circuit's options were either to apply a federal harmless error test to the Godfrey error, or to remand the case to the state courts. Instead, the Court erroneously applied an automatic affirmance rule (1) that was never invoked by the state courts in this case, (2) that this Court found in Clemons was not clearly the law in Mississippi, and (3) that is indisputably unconstitutional. Because an automatic affirmance rule was not relied upon by the state courts and was not clearly the law of Mississippi, the Fifth Circuit erred by holding the nonretroactivity of Clemons determinative of James Stringer's claim. As this court discussed in Sawyer v. Smith, 110 S.Ct. 2822, 2832 (1990), the retroactivity of a case need not be considered where the defendant does not rely on the constitutional rule stated in the case. Alternatively, assuming that petitioner must rely upon constitutional doctrine stated Clemons, the court below erred by holding Clemons nonretroactive to James Stringer.<sup>2</sup>

<sup>2</sup> The questions presented encompass several alternative grounds for relief. James Stringer need only show that Cartwright should be retroactively applied and (1) the court below failed to follow this Court's direction in Clemons that Mississippi did not clearly have a rule of automatic affirmance; (2) the court below failed to comply with Harris v. Reed, 489 U.S. 255 (1989); (3) the State of Mississippi has waived the defense of the nonretroactivity of Clemons; or (4) the holding in Clemons that a rule of automatic affirmance is unconstitutional should be retroactively applied.

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER  
THE COURT BELOW DISREGARDED THIS COURT'S REMAND  
INSTRUCTION TO RECONSIDER THIS CASE IN LIGHT OF  
CLEMONS V. MISSISSIPPI BY APPLYING A STATE  
RULE OF AUTOMATIC AFFIRMANCE THAT THIS COURT  
FOUND DID NOT CLEARLY EXIST IN CLEMONS

This Court remanded James Stringer's case for reconsideration in light of Clemons v. Mississippi, 110 S.Ct. 1441 (1990). The court below did not consider the case in light of Clemons. The teachings of Clemons relevant to James Stringer's habeas claims are: (1) the Mississippi Supreme Court did not clearly apply a rule of automatic affirmance to a death sentence tainted by an unconstitutional aggravating circumstance, where other valid aggravating circumstances remained; and (2) if a state court does apply a rule of automatic affirmance, such a rule is unconstitutional. Either of these holdings individually is sufficient to require James Stringer's sentence of death to be vacated.

On remand, the court below did not consider James Stringer's case in light of these teachings in Clemons. Stringer v. Black, 909 F.2d 111 (1990). The Fifth Circuit gave no explanation for not applying the first Clemons holding that Mississippi did not clearly impose an invariable rule of automatic affirmance. Further, that court avoided applying the second Clemons holding by invoking Teague v. Lane, 489 U.S. 288 (1989).

At the time of the decision in Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), rendered prior to Clemons, Mississippi

state law was unclear as to whether a rule of affirmance automatically applied where an invalid aggravating circumstance was relied upon by the jury. See Johnson v. State, 511 So.2d 1333, 1338 (Miss. 1987); see also Stringer v. Jackson, 862 F.2d 1108, 1125-1126 (Johnson, J. dissenting). The state law was sufficiently clouded by the time of the oral argument in Clemons v. Mississippi that the State was able to credibly argue that no rule of automatic affirmance was applied by the Mississippi Supreme Court. Clemons v. Mississippi, No.88-6873, Transcript of Oral Argument at p.22. Rather, the state assistant attorney general maintained that the Mississippi Supreme Court reweighed aggravating and mitigating circumstances on a case-by-case basis.<sup>3</sup> The State further insisted that "a proper reweighing of aggravating circumstances was undertaken" in Clemons' case. Clemons v. Mississippi, 110 S.Ct. at 1449. That Mississippi's law was unclear on the effect of an invalid aggravating circumstance on a sentence of death was not surprising; prior to Clemons v. State, 535 So.2d 1354 (Miss. 1988), the Mississippi Supreme Court had never found an aggravating circumstance invalid or unconstitutional.

Clemons v. Mississippi is authority for the proposition that the Mississippi Supreme Court did not have an invariable rule of automatic affirmance. This Court refused to find that Mississippi

<sup>3</sup> With no great concern for consistency, the State argued in Clemons that the Mississippi Supreme Court performs a reweighing function. Yet, on remand in Stringer, the State argued that Clemons should not be applied retroactively because it overruled Mississippi's rule of automatic affirmance.



had relied upon an inflexible rule in Clemons. 110 S.Ct. at 1449-1450 ("We find the opinion below unclear with respect to whether the Mississippi Supreme Court did perform a weighing function" and, the Mississippi Supreme Court's opinion "does not necessarily indicate that no reweighing was undertaken"). If Mississippi invariably applied a rule of automatic affirmance, any discussion of appellate reweighing would have been meaningless.

After Clemons, the Fifth Circuit again upheld James Stringer's sentence of death, ignoring this language in Clemons, and holding that decision nonretroactive pursuant to Teague v. Lane. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). In doing so, the Fifth Circuit implicitly reapplied a state law automatic affirmance "rule".<sup>4</sup> At the time that court applied the automatic affirmance rule, it did so knowing it was unconstitutional. See Clemons v. Mississippi, 110 S.Ct., at 1450.

What the Fifth Circuit did can't be squared with Clemons, and is hardly reconsideration in light of this Court's teachings in that case. Indeed, the lower court refused to defer to this Court's interpretation of Mississippi law. In Stringer's case, the state court was silent as to whether a rule of automatic affirmance applied. The Fifth Circuit could only find such a rule by looking to other Mississippi cases. This Court found no such clear statement of a rule in Clemons.

<sup>4</sup> The Fifth Circuit reinstated its previous judgment, Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), which relied upon Mississippi's rule of automatic affirmance to uphold James Stringer's sentence of death. Id., at 1115.

The Court below refused to apply Clemons because it held it nonretroactive under Teague v. Lane, 489 U.S. 288 (1989). However, the controlling holding of Clemons described above involves no statement of constitutional doctrine, much less a "new" statement of constitutional doctrine. What is at issue is the correct interpretation of Mississippi law. Because the Fifth Circuit's interpretation of Mississippi law is inconsistent with this Court's interpretation, it must fall.

Premises considered, this Court should summarily reverse the case in light of Clemons v. Mississippi and allow the Mississippi courts the opportunity to apply a lawful remedy to the constitutional violation.

## II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE  
WHETHER A FEDERAL COURT CAN AVOID GRANTING  
RELIEF FROM AN UNCONSTITUTIONAL DEATH  
SENTENCE BY INVOKING A STATE "HARMLESS ERROR"  
RULE (1) THAT WAS NOT IMPOSED BY THE  
STATE COURTS, AND (2) THAT IS PLAINLY  
UNCONSTITUTIONAL UNDER CLEMONS V. MISSISSIPPI,  
AND CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967).

Certiorari should be granted to clarify the proper scope of the "plain statement" rule of Harris v. Reed, 489 U.S. 255 (1989).<sup>5</sup>

<sup>5</sup> This Court recently granted certiorari to resolve differences among the circuits regarding the proper interpretation and scope of the court's decision in Harris v. Reed, 489 U.S. 255 (1989). Coleman v. Thompson, cert. granted, \_\_\_ U.S. \_\_\_, No. 89-7662 (October 29, 1990). In Coleman, the Fourth Circuit barred the petitioner's claim based upon an arguably ambiguous one paragraph order of the Virginia Supreme Court denying Coleman relief. The Virginia court dismissed Coleman's post-conviction appeal, but did not state that the dismissal was independently based on a state procedural rule. Unlike Coleman, disposition of this case under Harris is crystal clear. The State does not claim that the state rule, relied upon by the federal courts to deny James Stringer

The Fifth Circuit erred by applying a state harmless error rule, not invoked by the state courts, to a federal constitutional violation. The state law harmless error rule was neither relied upon by the state court, nor based on "adequate" and "independent" state grounds within the meaning of Harris v. Reed, 489 U.S. 255 (1989). Further, the state rule, which permits the automatic affirmance of death sentences by an appellate court without individualized consideration of the effect of the constitutional error on the sentence, is plainly unconstitutional under Clemons v. Mississippi, 110 S.Ct. 1441, 1451 (1990) and Chapman v. California, 386 U.S. 18 (1967).

The court below improperly invoked state law in the absence of a "plain statement" by the state court of an adequate and independent state law basis for its decision. The federal courts must reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds.' The Long 'plain statement' rule applies regardless of whether the disputed state-law ground is substantive (as it was in Long) or procedural, as in Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)." Harris v. Reed, 489 U.S. 255, 261 (1989), citing Michigan v. Long, 463 U.S.

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relief, was ever invoked by the state courts in his case. For this reason, petitioner is requesting summary reversal in light of Harris v. Reed.

1032, 1042 (1983).<sup>6</sup> This Court applied the Long doctrine in Harris v. Reed to cases in federal habeas corpus proceedings pursuant to 28 U.S.C. Section 2254.

The court below failed to apply the "plain statement" rule to James Stringer. Following Harris and Long, since the Mississippi Supreme Court did not actually rely upon a state rule of automatic affirmance to deny relief on the basis of the unconstitutional aggravating circumstance, the federal courts should not apply the alleged state rule to bar relief.

Additionally, the state rule was not "adequate" or "independent" under Harris and Long.

In Chapman v. California, this court refused to honor a state harmless error rule applied to a violation of the United States Constitution, which afforded a criminal defendant less protection than a federal harmless error standard. According to Justice Black, "whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." Chapman, 386 U.S., at 21. In Clemons v. Mississippi, this Court noted in passing that Chapman stated the "proper" test for harmless error in this situation.

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<sup>6</sup> This Court applied the Long rule in the context of reviewing a state's harmless error analysis in Delaware v. Van Arsdale, 475 U.S. 673 (1986).



The Fifth Circuit in James Stringer's case flaunted Chapman and Clemons both by applying a state rule contrary to federal law and by not exercising its independent judgment concerning a federal question. That court deferred to Mississippi's uninvoked rule: "We look to Mississippi to decide the impact of the invalid aggravating circumstance on Stringer's death sentence." Stringer v. Jackson, 862 F.2d 1108, 1115 (5th Cir. 1988).

Even assuming that the Fifth Circuit had discretion to invoke a state rule not invoked by the state court, it does not have the discretion to invoke a plainly unconstitutional state rule. A federal court surely cannot in its discretion apply state law, where that law has not been invoked or relied upon by the state court, in a manner which renders it unconstitutional.

Teague v. Lane, 489 U.S. 288 (1989), is meant to validate reasonable interpretations of federal constitutional law made by the state courts. See Butler v. McKellar, 110 S.Ct. 1212, 1217 (1990). The Fifth Circuit has enforced an unconstitutional state harmless error rule, that the state court had not invoked. The only court to rely upon the unconstitutional rule of automatic affirmance was the Fifth Circuit, not the state courts. James Stringer went into the Fifth Circuit with one constitutional error at the sentencing phase of his trial; he came out of the Fifth Circuit with two constitutional errors. Correction of the Fifth Circuit's error regarding the proper application of a harmless error test does not implicate Teague. To the contrary, by reaching out to attribute to the state court an unconstitutional basis for

a decision which was not first invoked by the state court or clearly sanctioned by state law, the court below has positively harmed the interests of comity and federalism.

Without grounding the decision in a "plain statement" of state law by the Mississippi Supreme Court in James Stringer's case, the Fifth Circuit has presumed that the Mississippi courts would follow an unconstitutional course by automatically upholding the death sentence. Needless to say, Federal courts should be especially cautious before ascribing to a state court intentions which are unconstitutional (as this Court was in Clemons). Principles of federalism and comity are offended when, as here, a federal court reads into a state court decision a principle of state law that the state court had not considered or relied upon in the case. See Cabana v. Bullock, 474 U.S. 376, 391 (1986) (the state has "'a weighty interest in having valid constitutional criteria applied in the administration of its criminal law by its own courts.'") That is doubly true when the principle of state law introduced by the federal court is indubitably unconstitutional. Post hoc application of an unconstitutional rule does nothing to advance the interests protected by Teague v. Lane, supra. Further, such a course is prohibited by Michigan v. Long, and Harris v. Reed.

Wherefore, premises considered, this case should be reversed summarily in light of Chapman v. California, Clemons v. Mississippi, and Harris v. Reed, or, in the alternative, certiorari should be granted to consider this question.

III.

THE COURT SHOULD GRANT CERTIORARI  
TO RESOLVE THE CONFLICT AMONG  
THE LOWER COURTS AS TO WHETHER  
CLEMONS AND CARTWRIGHT WERE  
DICTATED BY PRECEDENT, SUCH THAT  
THEY CANNOT BE CONSIDERED "NEW  
RULES" UNDER TEAGUE

The court below held that claims raised under Clemons and Maynard are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under Teague. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). This decision, along with the Fifth Circuit decision in Smith v. Black, 904 F.2d 950 (5th Cir. 1990), have created a conflict of law among the federal circuits which should be resolved by this court.

A. Maynard v. Cartwright should be applied retroactively

Maynard v. Cartwright, 486 U.S. 356 (1988), held unconstitutional an Oklahoma statute which permitted a criminal defendant to be sentenced to death based upon an aggravating circumstance that the defendant's conduct was "especially heinous, atrocious or cruel." As this noted, Cartwright was a straightforward application of Godfrey v. Georgia, 446 U.S. 420 (1980): "Godfrey controls this case." Cartwright, 486 U.S. at 363 (emphasis added); see also, Lewis v. Jeffers, 110 S.Ct. 3092, 3100 (1990)(In Cartwright, "we applied the teachings of Godfrey.")

Other circuits that have explicitly considered this issue have held Cartwright to be retroactive. Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989) (Cartwright is dictated by Godfrey and is therefore not a "new rule" for purposes of Teague v. Lane);

Davis v. Maynard, 911 F.2d 415, 418 (10th Cir. 1990) (Godfrey, decided three years before Davis' conviction became final, clearly dictated our holding in Cartwright, and therefore we did not create a new rule under Teague and Penry.)

Godfrey held unconstitutional a death sentence in which the jury found as an aggravating circumstance that the defendant's conduct was "outrageously or wantonly vile, horrible, or inhuman." As the Godfrey Court noted, "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey, 446 U.S. at 428-29. Cartwright simply applied the legal rule set forth in Godfrey to the particular statutory language at issue in Cartwright: the words "heinous, atrocious or cruel." Thus in Cartwright, the Court found "the language . . . 'especially heinous, atrocious, or cruel' "-- gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language . . . in Godfrey." Cartwright, 486 U.S. at 363-64.

Only the State's statutory language in Cartwright, which provided the factual background for the challenge to the statute, distinguishes Cartwright from Godfrey. The rule in both cases is the same: the Eighth Amendment forbids a state from imposing a sentence of death based upon a standardless death penalty statute. Cartwright is not "new" simply because it applied this rule to the words "heinous, atrocious, or cruel," whereas Godfrey applied the rule to the words "wantonly vile, horrible or inhuman."

This Court first reviewed the "especially heinous, atrocious,



or cruel" aggravating circumstance in Proffitt v. Florida, 428 U.S. 242 (1976). In Proffitt, the court reviewed an argument that this aggravating circumstance was vague and overbroad. 428 U.S. at 255. The Court noted that the Florida Supreme Court had consistently applied a limiting construction so that the statutory provision was "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Id. (citations omitted). The court concluded that "[w]e cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, at 200-203." Id. at 255-256. (emphasis added).

Likewise in Gregg v. Georgia, 428 U.S. 153, 200-203 (1976), this Court upheld the facial validity of the 'outrageously or wantonly vile, horrible or inhuman' language of the Georgia aggravating circumstance. The United States Supreme Court predicated its affirmance of the aggravating circumstance on the premise that the Georgia Supreme Court would not adopt an open-ended construction. Id. at 201. When it became clear that such an openended and overbroad application of the "outrageously or wantonly vile, horrible or inhuman" circumstance was the practice in Georgia, the Court held the circumstance unconstitutional as applied, Godfrey v. Georgia, 446 U.S. 420 (1980).

This Court's decisions in Gregg, Proffitt, and Godfrey, read in conjunction, left no doubt that the "especially heinous, atrocious, or cruel" aggravating circumstance must be construed and

applied narrowly. Furthermore, the Court stated that Godfrey applied to the "especially heinous, atrocious or cruel" aggravating circumstance in Eddings v. Oklahoma, 455 U.S. 104, 109 fn. 4(1982):

We understand the Court of Criminal Appeals to hold that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel" under the Oklahoma statute. See Roberts v. Louisiana, 431 U.S. 633, 636, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977). However, we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The genesis of the above jurisprudence parallels the jurisprudence described in Penry v. Lynaugh, 109 S.Ct. 2934 (1989). In Penry, this Court applied its decision retroactively notwithstanding the Texas statute was deemed facially valid in Jurek. According to the Court, "the facial validity of the Texas death penalty statute had been upheld in Jurek on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present." 109 S.Ct. at 2946-47. Penry argued that those "assurances were not fulfilled in his particular case," and the Court concluded "in light of assurances upon which Jurek was based", the relief Penry sought does not impose a new rule on the State of Texas. Id. at 2947 (emphasis in the original).

The decision below is inconsistent with Lewis v. Jeffers, 110 S.Ct. 3092 (1990). Retroactivity is a threshold issue in federal

habeas corpus proceedings. See, e.g., Teague v. Lane, 489 U.S., at 300; Saffle v. Parks, 110 S.Ct. 1257, 1259 (1990). It is significant, therefore, that in Lewis v. Jeffers, 110 S.Ct. 3092 (1990), this Court evaluated the Cartwright challenge to Arizona's "especially heinous" aggravating circumstance without a single reference to retroactivity.

For these reasons, Cartwright is not "new law" for purposes of the doctrine of nonretroactivity and the Teague bar does not apply.

B. Clemons should be applied retroactively

Assuming arguendo, that James Stringer must also rely upon Clemons v. Mississippi,<sup>7</sup> that case should be retroactively applied.

This Court held in Clemons that,

An automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. Barclay v. Florida, 463 U.S. 939, 958 (1983).

Clemons v. Mississippi, 110 S.Ct. at 1450. The court below found this language to constitute a "new rule" which precludes retroactive application to convictions which were final at the time the rule was announced.

<sup>7</sup> Since the state appellate court did not rely upon an unconstitutional rule of automatic affirmance, and because this Court held in Clemons that such a rule did not clearly exist in Mississippi, the retroactivity of Clemons v. Mississippi is not at issue, and should therefore not have been held determinative by the court below.

The caveat of Clemons v. Mississippi that the state appellate court in a weighing state cannot cure constitutional error without consideration of both aggravating and mitigating circumstances, is no "new obligation" on the state of Mississippi.

The traditional harmless error rule applicable to federal constitutional error was stated by the United States Supreme Court in Chapman v. California, 386 U.S. 18, 24 (1967). That rule requires the state to prove "beyond a reasonable doubt" that the error was harmless. Clemons v. Mississippi reaffirmed the applicability of this rule to sentencing phase error. In addition, this Court gave state appellate courts the option of "reweighing" valid aggravating and mitigating circumstances. The Chapman test does not permit a reviewing court to do nothing about constitutional error by "automatically affirming" without regard to evidence favorable to the defendant. Clearly, each application of Chapman to a different category of federal error does not create a "new rule" under Teague, yet that is the essence of the Fifth Circuit opinion in this case.

In Barclay v. Florida, 463 U.S. 939 (1983), this Court reviewed an error of state law during the sentencing phase of a capital case in a "weighing jurisdiction" - - i.e., where the capital sentencer weighs aggravating and mitigating circumstances in determining punishment. The Court framed the critical question as "whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida Statute that it is constitutionally impermissible



for the Florida Supreme Court to let the sentence stand." Id., at 956; see also Wainwright v. Goode, 464 U.S. 78, 86 (1983). The Court relied in part upon the fact that "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." 463 U.S. at 958. The Court emphasized the necessity that such an analysis include an "'individualized determination on the basis of the character of the individual and the circumstances of the crime.'" Id., quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis added in Barclay). If under Barclay, an automatic affirmance rule does not cure errors of state law in a weighing state, such a rule cannot apply to resolve violations of the federal constitution.

An automatic rule of affirmance disregards all mitigating circumstances. Long ago, in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court set forth as one of the bedrock features of the Eighth Amendment that a capital defendant is entitled to individualized treatment of mitigating circumstances, such that any State rule precluding consideration of individualized mitigation is constitutionally infirm. This "rule" is of sufficient vintage to withstand any attack on its applicability in habeas review of death sentences. See Penry v. Lynaugh, 109 S.Ct. 2934 (1989) (Rule that juries must be given instructions that make it possible for them to give effect to mitigating evidence dictated by Lockett and Eddings). The rule

applied to any sentencer in a capital case, whether it be a judge or a jury. In Clemons, this Court merely applied the Lockett rule to a state appellate court's determination to let stand a death sentence which, at the trial level, was tainted by an unconstitutional aggravating circumstance.

Consequently, the state courts could not reasonably believe that an "automatic affirmance rule" would cure an unconstitutional aggravating circumstance relied upon by the jury in a weighing jurisdiction prior to Clemons v. Mississippi.

#### IV.

THIS COURT SHOULD GRANT CERTIORARI TO  
DETERMINE WHETHER THE REQUIREMENT OF LIMITED  
SENTENCING DISCRETION IS A BEDROCK  
PROCEDURAL ELEMENT ESSENTIAL TO THE FAIRNESS  
OF A CAPITAL SENTENCING PROCEEDING

Certiorari should be granted to resolve a question of extraordinary importance as to what constitutes a bedrock procedural element essential to the fairness of a capital sentencing proceeding. Assuming arguendo that either Cartwright or Clemons is a "new rule" which must be relied upon by James Stringer, the question is presented whether the Eighth Amendment requirement of limited sentencing discretion in capital cases which is protected by these rules is of such importance to the fundamental fairness and accuracy of the sentencing process as to be applicable in habeas review under the second Teague exception. Under this exception, "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" are applied retroactively despite their novelty, see

Saffle v. Parks, 110 S.Ct. 1257, 1263 (1990); Sawyer v. Smith, 110 S.Ct. 2822, 2831 (1990).

According to this Court in Cartwright, Godfrey v. Georgia, 446 U.S. 420 (1980), "which is very relevant here", applied the "central tenet of Eighth Amendment law" stating a "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Cartwright, 486 U.S., at 362 (emphasis added). This theme has been echoed in other recent decisions. In Lewis v. Jeffers, 110 S.Ct. 3092 (1990), this Court stated:

Our capital punishment doctrine is rooted in the principle that "[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed." Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion) [quoting Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)]; see also Furman, *supra*, at 313 (White, J., concurring) (invalidating capital punishment statute where "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.") Accordingly, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S., at 189.

This principle requires a State to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, *supra*, 446 U.S., at 428.

Jeffers, 110 S.Ct., at 3099.

In Walton v. Arizona, 110 S.Ct. 3047 (1990), Justice Scalia underlined the centrality of the principle of limited discretion in capital sentencing:

[W]e have routinely read Furman as standing for the proposition that "channeling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," Maynard v. Cartwright, 486 U.S. 356, 362 (1988), and have insisted that States furnish the sentencer with "'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. at 428.

Walton, 110 S.Ct., at 3060-3061 (Scalia, J., concurring).

Both Cartwright and Clemons protect the "fundamental constitutional requirement" of limited discretion in capital sentencing. Godfrey, Cartwright, and Clemons, enforcing as they do the central principle of Eighth Amendment jurisprudence, announce "watershed rules" of capital procedure which must be applied on habeas review of death sentences. Therefore, even if this Court should find that Cartwright and Clemons announce "new rules," under the second Teague exception, these protections of the fundamental constitutional principle of limited sentencing discretion in capital cases must be given retroactive effect.

#### V.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE LOWER COURTS AS TO WHETHER THE DEFENSE OF NONRETROACTIVITY IS WAIVED WHERE THE STATE DELIBERATELY DECLINES TO RAISE THE DEFENSE IN ONE FEDERAL COURT FORUM, AND RAISES THE DEFENSE IN THE NEXT.



This Court should grant certiorari to resolve the split among the lower courts as to whether the defense of the nonretroactivity of a "new" law claim is waived where the State deliberately declines to raise the defense in one federal court forum, yet raises it in the next. The Seventh Circuit has held that the defense can be waived, while the Fifth and Sixth Circuits have eschewed waiver. Compare, e.g., Hills v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989) and Smith v. Black, 904 F.2d 950, 981, n.12 (1990) (deciding application of Teague) with Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990).

Respondent has waived the defense of the nonretroactivity of Cartwright and Clemons. Respondent did not assert a nonretroactivity defense at any time in the Federal District Court, as a defense to James Stringer's claims stated in his Petition for Writ of Habeas Corpus. Following the United States Supreme Court's decision in Maynard v. Cartwright, the state did not allege nonretroactivity of the decision while James Stringer's appeal was pending in the Fifth Circuit, though that defense was clearly available. Respondent did not assert nonretroactivity as a defense in its response to James Stringer's Petition for Writ of Certiorari.

Finally, the State of Mississippi did not assert a defense of nonretroactivity of Maynard v. Cartwright or Clemons v. Mississippi in supplemental briefing in this Court following the Court's decision in Clemons. Respondent's Supplemental Brief in Opposition

to the Granting of Certiorari at p. 8. As a strategic matter, the State of Mississippi tried in vain to convince this Court that the Mississippi Supreme Court had "perform[ed] a reweighing or harmless error analysis" in James Stringer's case, and "affirm[ed] the sentence in the face of an invalid aggravating circumstance." In stark contrast, the State of Mississippi did at that time assert a defense of nonretroactivity to James Stringer's claim that his sentence of death should be vacated and remanded in light of McKoy v. North Carolina, 110 S.Ct. 1227 (1990). There could hardly be clearer evidence of a calculated and deliberate waiver of a defense.

The State of Mississippi raised a defense of nonretroactivity of Maynard v. Cartwright and Clemons v. Mississippi for the first time after Stringer's case was remanded by this Court to the United States Court of Appeals for further consideration in light of Clemons.

Questions of retroactivity are analogous to questions of federal enforcement of state procedural bar rules. Like Wainwright v. Sykes issues, "the Teague rule is grounded in important considerations of federal-state relations", but is not "jurisdictional". Collins v. Youngblood, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2715, 2718 (1990). In Collins v. Youngblood, the United States Supreme Court permitted the Attorney General, on behalf of the State of Texas, to waive reliance on retroactivity.

Like questions of state procedural bars, the federal courts have no independent interest in refusing to apply a decision

retroactively other than the state interest in finality of its decisions. Thus if the state determines that its interest in enforcing a constitutional rule retroactively outweighs its interest in finality, the federal courts have no stake in barring that claim.

In Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990), the court held that the state had waived any objection to the retroactive application of the rule established in Cruz v. New York, 481 U.S. 186 (1987) - - regarding the use of "interlocking confessions" - - because of its failure to raise the defense in a timely fashion. In briefing the issue in the district court, the state addressed the merits of Cruz's argument, without suggesting that the decision should not be applied to the petitioner's case. The court of appeals thus concluded that, by this failure, the state had "missed the boat." Hanrahan, 896 F.2d at 245; see Moore v. Zant, 885 F.2d 1497, 1524 (11th Cir. 1989)(en banc)(Johnson, J., dissenting) (nonretroactivity is an affirmative defense that is lost if not timely raised). In a related context,<sup>8</sup> the Fifth Circuit has held that the state had waived the defense of procedural default by failing to assert it earlier. Mayo v. Lynaugh, 893 F.2d 683 (5th Cir. 1990); see also Francis v. Rison, 894 F.2d 353 (9th Cir. 1990); Young v. Lockhart, 892 F.2d 1384 (8th Cir. 1990)(all holding

<sup>8</sup> The defenses of waiver and nonretroactivity are intended to protect the same interests of comity and federalism. See Teague v. Lane, 109 S.Ct. at 1073; Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977)

that the state had waived the defense of procedural default by failing to assert it in a timely fashion.)

In Granberry v. Greer, 481 U.S. 129 (1987), this Court addressed the question of "[h]ow an appellate court ought to handle a nonexhausted habeas petition when the State has not raised this objection in the district court. . . ." Id. at 131. Rejecting the State's position adopted by the United States Court of Appeals for the Seventh Circuit, that the required exhaustion of state remedies was an inflexible bar to consideration of the merits of the petition by the federal court, the Court condemned the adoption of "a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use in appeal if necessary." Id. at 132. Hence, this Court has criticized "rules that allow a party to withhold raising a defense until after the 'main event'". Id. at 132.

Assuming the state's nonretroactivity argument is otherwise meritorious, considerable delay has been caused by the state's failure to timely assert that defense. Permitting the state to waive a defense in one forum and assert it subsequently severely burdens the habeas corpus system. Had the State initially raised the nonretroactivity defense in this Court, the Court would have had the opportunity to determine the question prior to granting certiorari and vacating the prior Fifth Circuit decision. Instead, the State's deliberate inaction forces multitudinous litigation. A consistently applied procedural rule which applies to both



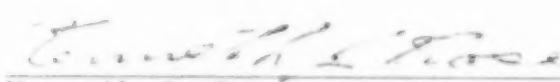
litigants would streamline litigation and enhance the fairness of habeas proceedings.

Premises considered, certiorari should be granted to determine whether the State of Mississippi has waived the defense of nonretroactivity.

### CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

  
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language of the hearing panel's decision and found that the panel had used "mandatory, not discretionary language." 365 S.E.2d at 760. Read in the light of the statutory command in § 2.1-114.5:1(D)(4) that the panel's decision be "binding," the court did not hesitate to require implementation of the hearing panel's decision to reinstate the deputy to his former rank.

The *Angle* court did not address the constitutional question that is the single relevant issue in this case. In holding that a sheriff is bound once his deputy proceeds through the grievance process to the "final and binding" step of a hearing panel determination, the court did not rely on any expectation of continued employment that might be sufficient to create a protectible property interest.<sup>14</sup> Rather, the court held that the panel's decision, once rendered, was enforceable against the sheriff. Enforcing the panel's decision in this context did not imply a property interest in continued employment.

#### IV

[5] Jenkins' federal claim under 42 U.S.C. § 1983 was properly dismissed upon the district court's ruling that he lacked a constitutionally protectible property interest. The court, however, dismissed Jenkins' entire case when it granted the defendants' motion for summary judgment. Their respective summary judgment memoranda filed with the district court, the parties joined issue on the question whether the district court should retain jurisdiction over Jenkins' pending state law claims, but the court did not address that question in either its memorandum opinion or its judgment.

13. In this case, Jenkins was dismissed, not demoted. Given our disposition, we need not determine whether different considerations are relevant when a sheriff dismisses, rather than merely demotes, a deputy.

14. One obvious alternative rationale for the *Angle* court's decision is estoppel. See, e.g., *Employers Commercial Union Ins. Co. v. Great Am. Ins. Co.*, 214 Va. 410, 200 S.E.2d 560 (1973); *Thresher v. Thresher*, 210 Va. 624, 172 S.E.2d 771 (1970); *Cornington Virginian v. Woods*, 182 Va. 538, 29 S.E.2d 406 (1944); cf. *Richard L. Deaf & Assoc. v. Commonwealth*, 224 Va. 618,

ment order. Jenkins' § 1983 claim was substantial enough as pleaded to invoke federal jurisdiction to inquire into its merits. That federal jurisdiction was sufficient to support pending jurisdiction over Jenkins' state law claims even if his federal claim was, properly, dismissed. See *Ridley v. our v. Andrews Fed. Credit Union*, 897 F.2d 715, 719, 722 (4th Cir.1990); see also 138 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3564 (1994). Because we are unable, in the absence of a ruling from the district court, to effectively review the court's disposition of Jenkins' pending state claims, we think it appropriate to remand those claims to the district court for the discretionary determination whether the claims should be dismissed without prejudice or retained for decision under pending jurisdiction. See *UMW v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); see also *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1123, 1144 (4th Cir.1982).

#### V

We affirm the district court's grant of summary judgment in favor of the defendants on Jenkins' § 1983 claim and the subsequent dismissal of that claim. We remand Jenkins' state law claims for the district court to determine whether to dismiss those claims without prejudice or to retain them in the exercise of pendent jurisdiction.

SO ORDERED.



299 S.E.2d 346 (1983) (state not estopped to deny arbitration ruling where state agents had no authority to agree to arbitration of claim).

15. In remanding Jenkins' state law claims, we of course express no opinion on the merits of those claims. We also express no opinion on the issue whether any unusual circumstances exist, such as statute of limitations problems, that might militate in favor of retention of pendent jurisdiction and override the usual approach that where federal claims are dismissed before trial, any pending state claims should be dismissed as well.

James R. STRINGER,  
Petitioner-Appellant,

*Stringer v. Mississippi*, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985). A panel of the Fifth Circuit has recently held that claims raised under *Clemons* and *Maynard* are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under *Teague*. *Smith v. Black*, 904 F.2d 950, (5th Cir.1990).

Charles J. JACKSON, Interim Commissioner, Mississippi Department of Corrections, et al., Respondents-Appellees.

No. 89-4126.

United States Court of Appeals,  
Fifth Circuit.  
July 30, 1990.

James E. Ostgard, Minneapolis, Minn. (court-appointed), Kenneth J. Rose, Durham, N.C. (court-appointed), Dennis Sweet, Jackson, Miss. (court-appointed), for petitioner-appellant.

Marvin L. White, Jr., Felicia C. Adams, Asst. Attys. Gen., Jackson, Miss., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., Judge.  
ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES.  
— U.S. —, 110 S.Ct. 1800, 108 L.Ed.2d 931

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge:

This cause has been remanded to us by the Supreme Court for reconsideration in light of *Clemons v. Mississippi*, 494 U.S. —, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). The problem corresponds to the issue treated in *Maynard v. Carter*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1985). The Attorney General of Mississippi objects to our application of these two cases here on the ground that Stringer's conviction was final prior to either decision, and therefore any claim on that ground is barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That objection is well taken.

Stringer's conviction was final on February 19, 1985 when the Supreme Court denied his petition for writ of certiorari directed at his conviction and sentence.



UNITED STATES OF America,  
Plaintiff-Appellee,

James Othel BORUFF,  
Defendant-Appellant.

No. 89-1903

Summary Calendar.

United States Court of Appeals,  
Fifth Circuit.

July 31, 1990.

Defendant's motion to suppress evidence found after stop of vehicles was granted, but the Court of Appeals reversed, 818 F.2d 863 (unpublished opinion). Defendant's motion to suppress trial testimony of witness who had testified on his behalf at suppression hearing was denied, and the Court of Appeals affirmed, 870 F.2d 316. Defendant was then convicted in the United States District Court for the Western District of Texas, Lucius Desha Burton, III, Chief Judge, of conspiracy to possess and possession of more than 50 kilograms of marijuana with intent to distribute, and he appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) defendant did not have standing to chal-

for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.



James R. STRINGER,  
Petitioner-Appellant,

v.

Charles J. JACKSON, Interim Commissioner, Mississippi Dept. of Corrections, et al., Respondents-Appellees.

No. 88-1126.

United States Court of Appeals,  
Fifth Circuit.

Dec. 22, 1988.

Rehearing and Rehearing En Banc  
Denied Jan. 20, 1989.

State prisoner under sentence of death sought habeas corpus. The United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., J., 675 F.Supp. 356, denied relief and prisoner appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) prisoner received effective assistance of counsel; (2) prisoner did not show conflict of interest on the part of trial counsel or appellate counsel representing both himself and his son; (3) trial court's instructions on mitigating circumstances were proper; and (4) death sentence need not be vacated even when one of three statutory mitigating circumstances found by the jury in subsequently held to be invalid and jury has been instructed to weigh the statutory aggravating circumstances against all mitigating circumstances.

Affirmed.

Johnson, Circuit Judge, filed a dissenting opinion.

#### 1. Habeas Corpus @45.3(1.40)

Claim of prosecutorial misconduct was procedurally barred from consideration in habeas corpus proceeding where no objections were raised either at trial or on direct appeal.

#### 2. Criminal Law @723(1)

Prosecutor's statements during voir dire that there were nine judges sitting on the Supreme Court to whom the prosecutor would have to answer and that the court has to make certain decisions did not mislead the jurors into believing that their decision on defendant's sentence rested with appellate judges rather with them, where the prosecutor's remarks were directed toward an explanation to a juror that the law required that his questions be precise.

#### 3. Criminal Law @796

Instruction that jury could return a life sentence if it found no aggravating circumstances or if it failed to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and that the jury had to find both that the aggravating circumstances outweighed the mitigating circumstances and that the death penalty should be imposed before imposing the death penalty did not make the death penalty mandatory.

#### 4. Criminal Law @822(2)

Although trial court used word "unanimously" when instructing the jury on consideration of mitigating circumstances, the instructions, when taken as a whole, did not lead the jurors to think that they were compelled to ignore mitigating circumstances unless they found them unanimous.

#### 5. Criminal Law @796

Trial court's instruction that jurors could consider any and all matters, facts, or circumstances or combination of circumstances surrounding defendant's life, his character, or his record in reaching its decision left the jury free to consider whatever mitigating evidence was raised.

Cite as 862 F.2d 1108 (5th Cir. 1988)

#### 12. Criminal Law @641.13(7)

Defendant was not prejudiced by counsel's performance in not presenting mitigating evidence at penalty phase of capital murder trial, despite claim that counsel should have presented evidence of defendant's war record, medical record, and reputation as a businessman and family man, as it was not likely that the evidence would have resulted in a different verdict in view of the state's evidence presented during guilt phase, which the jury obviously believed.

#### 13. Criminal Law @641.5

In order to prevail on claim of conflict of interest, defendant must demonstrate that actual conflict existed by pointing to specific instances in the record which reflect that counsel's performance on defendant's behalf was adversely affected by the conflict.

#### 11. Criminal Law @641.5

Speculative or merely hypothetical conflicts do not implicate the Sixth Amendment right to the effective assistance of counsel. U.S.C.A. Const.Amend. 6.

#### 15. Criminal Law @641.5(3)

Counsel's representation of defendant as well as defendant's son, and son's girl friend who were also defendants, did not establish actual conflict of interest where the defense for all three was alibi and all three told the same story.

#### 16. Criminal Law @641.5

Fact that five of the six defense witnesses were represented by the same attorney as defendant, allowing prosecution to refer to those witnesses in closing argument as "Sam's Army," did not show actual conflict of interest where, if all the clients were telling the attorney the truth, as they assured him they were, the defense which he presented was the only one available to any of them.

#### 17. Criminal Law @641.13(7)

Counsel was not ineffective for failing to argue at sentencing phase of capital murder trial that it was defendant's son, and not defendant, who was the trigger-man who actually killed the victim as such

#### 6. Criminal Law @1177

Reversal of death sentence is not required when one of three statutory aggravating circumstances found by a jury in subsequently held to be invalid and the jury has been instructed to weigh the statutory aggravating circumstances against all mitigating circumstances in determining the appropriate sentence.

#### 7. Homicide @304(5), 309(6)

Defendant charged with capital murder was not entitled to instruction on lesser included offense of noncapital murder or manslaughter where, under the evidence presented, defendant either led a gang of robbers with the intent to murder two victims or else was at home nursing a back pain.

#### 8. Criminal Law @641.13(1)

In order to show ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that the deficiency actually prejudiced his defense, thereby making the result of the trial unreliable.

#### 9. Criminal Law @641.13(1)

Great deference is given to counsel's performance and it is evaluated in light of the facts and circumstances as they appeared to exist at the time of the trial.

#### 10. Criminal Law @641.13(7)

Failure to present a case in mitigation during the sentencing phase of a capital murder trial is not per se ineffective assistance of counsel.

#### 11. Criminal Law @641.13(7)

Defendant was not denied effective assistance of counsel by counsel's failure to present mitigating evidence where jury's guilty verdict showed what it thought of defendant's alibi and that they had found him guilty of the deliberate massacre of innocent human beings, so that the testimony of someone who had known and liked defendant years ago was not going to lessen the impact of the evidence, and counsel's only hope was to get at least one juror to have enough misgiving regarding defendant's guilt to block the death penalty.

an argument would not only have undermined any doubt which the jurors had regarding the defendant's guilt, but would also have sent the wrong message to the jury regarding defendant's character and family commitment.

#### 18. Criminal Law @641.5

Defendant did not show conflict of interest on the part of appellate counsel representing both himself and his son, despite claim that some arguments made on behalf of defendant's son were not made on behalf of defendant, where those arguments were not available to defendant because of the lack of objection at trial or because of differences in defendant's trial and that of his son.

#### 19. Constitutional Law @268(10)

Criminal Law @436(4)

Admission of photographs of murder scene did not violate defendant's due process rights. U.S.C.A. Const.Amend. 14.

James E. Ostgard, Minneapolis, Minn. (Court-appointed), Kenneth J. Rose, Dennis Sweet, Jackson, Miss. (Court-appointed), for petitioner-appellant.

Marvin L. White, Jr., Felicia C. Adams, Asst. Attys. Gen., Jackson, Miss., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge:

James R. Stringer seeks the writ of habeas corpus to avoid his sentence of death by the Mississippi courts. We affirm the district court's denial of the writ.

#### I. Background

On the evening of June 21, 1982, Ray McWilliams and his wife, Nell McWilliams, were murdered in their home in Jackson. The State's case against James Stringer rested upon the testimony of Rhonda Brock and Mike Medders, two of the five alleged

Cite as 862 F.2d 1108 (5th Cir. 1988)

rights. Because each of Stringer's points of error is either procedurally barred or without merit, we affirm the district court's denial of the writ.

II. Prosecutorial Misconduct

(1, 2) Stringer contends that his sentence of death should be overturned because of several alleged instances of prosecutorial misconduct: (1) comments made during voir dire and closing argument; (2) photographs of the McWilliams introduced into evidence; and (3) comments made regarding Stringer's refusal to take a polygraph test. Both the district court and the Mississippi Supreme Court held that this claim was procedurally barred because no objections were raised either at trial or on direct appeal. *Stringer*, 675 F.Supp. at 365; *Stringer*, 485 So.2d at 275. We agree that these complaints are procedurally barred. Moreover, we see no merit there. For example, Stringer complains about a statement the prosecutor made during closing, but the trial court did all that it was requested to do by sustaining the defense counsel's objection. If the introduction of the photographs and comments about them and the polygraph test were improper under any law, there was clearly no prejudice to Stringer's substantial rights. *See Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*. — U.S. —, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987). As for the contention that the prosecutor misled the jury into believing that the decision on Stringer's sentence rested with appellate judges rather than with them, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), Stringer points to two statements made during voir dire of prospective jurors: (1) that there are "nine Judges sitting up there on the Supreme Court that I've got to talk

#### III. Jury Instructions

Stringer asserts several points of error based on the trial court's instructions to the jury.

#### A. Life Option

Stringer contends that the trial court not only omitted necessary language from the instructions, but also included language "which would have misled the jury about whether mercy could be extended to the appellant." Stringer failed to raise this point before the district court and we need not address it. *See Willie v. Maggio*, 737 F.2d 1372, 1397-88 n. 20 (5th Cir.), *cert. denied*, 469 U.S. 1002, 105 S.Ct. 415, 83 L.Ed.2d 342 (1984). Moreover, the trial court's charge may not be construed as Stringer argues.

(3) The trial court instructed the jury that it could return a life sentence if it found no aggravating circumstances or if it failed to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances.<sup>1</sup> In order to impose the death penalty, the jury was instructed that it must find both that

outweigh the mitigating circumstances, then your verdict shall be in the following form: "We the Jury, find the defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court, and the Court shall, under the law, impose a sentence of imprisonment for life.



the aggravating circumstances outweighed the mitigating circumstances and that the death penalty should be imposed. Furthermore, the jury was told that the defendant would be sentenced to life imprisonment if they could not agree on punishment. These instructions did not make the death penalty mandatory. See *Edwards v. Scroggyn*, 849 F.2d 204, 213 (5th Cir.1988) (citing *Edwards v. Thigpen*, 595 F.Supp. 1271, 1286 (S.D.Miss.1984)).

Stringer next complains that, as in *Miller v. Maryland*, — U.S. —, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), the trial court erred in instructing the jury that it must unanimously find mitigating circumstances before it might weigh them against aggravating circumstances. The result of such an instruction, Stringer alleges, is that the sentencing phase of the trial became subject to the possibility of a completely arbitrary decision to impose death because one juror could prevent all other jurors from considering a particular mitigating circumstance.

In *Miller*, the Supreme Court considered the propriety of a verdict form submitted to a jury in a Maryland state court and concluded that "there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Miller*, 108 S.Ct. at 1870. In vacating the judgment which sustained the imposition of the death penalty,

2. The jury was instructed, in pertinent part, as follows:

If you unanimously find from the evidence any one or more of the mitigating circumstances listed above exists, and, if after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstance(s) outweigh the mitigating circumstance(s) and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

the Court focused on the specific instructions given in that particular case.

(4) Although the trial court undoubtedly added "unanimously" by oversight as the third word in the instructions quoted below,<sup>2</sup> a reading of the entire charge would not have led the jurors to think they were compelled to ignore mitigating circumstances (unless found unanimously) in determining an appropriate sentence for Stringer. The instructions given did not restrict the jury's right and power to consider the appropriateness of the death penalty even after it found that the aggravating circumstances outweighed the mitigating circumstances.

#### B. Mitigating Circumstances

(5) Stringer claims that the trial court's instructions improperly restricted the jury's consideration of mitigating circumstances in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The trial court instructed the jury that it could consider as mitigating, among other things, "any and all other matters, facts or circumstances, or combination of circumstances surrounding the defendant's life, character or record or any circumstance(s) of the offense brought before you during the trial of this cause which you, the jury, deem to be mitigating on behalf of the defendant or which reasonably mitigate against imposition of the death penalty." Under this instruction, Stringer's attorney was free to argue and the jury was free to consider whatever mitigating evidence was raised.

"We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstance(s), (list the aggravating circumstance(s), if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.) We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, that the aggravating circumstance(s) do outweigh the mitigating circumstance(s) and that the defendant should suffer the penalty of death." (emphasis added)

received during the trial as well as all facts and circumstances presented in extenuation, mitigation, or aggravation during the sentencing proceeding." *Zant*, 103 S.Ct. at 2737. The jury found three aggravating circumstances beyond a reasonable doubt and sentenced Stephens to death. The Georgia Supreme Court later held one of the statutory aggravating circumstances invalid on the ground that it was constitutionally vague, yet determined that the other two aggravating circumstances adequately supported the death sentence. *Id.* at 2738.

The United States Supreme Court ultimately upheld this decision, rejecting the defendant's contention that Georgia's statutory scheme was invalid under the holding in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In so doing, the Court emphasized two important features of Georgia's scheme which it determined adequately channelled the finder's discretion in imposing a sentence: first, that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and second, that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. *Zant*, 103 S.Ct. at 2742. The Court summarized its cases concerning the treatment of statutory aggravating circumstances:

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

*Zant*, 103 S.Ct. at 2743-44 (citations and footnote omitted).

The Mississippi capital sentencing scheme, though similar in many respects to Georgia's scheme, differs in one material aspect. Like Georgia, Mississippi requires the jury to find at least one statutory aggravating circumstance beyond a reasonable doubt in order to consider imposing the death penalty. Like Georgia, Mississippi requires the state supreme court to review each death penalty for arbitrariness and proportionality. Unlike Georgia, however, Mississippi requires that the jury weigh statutory aggravating circumstances against all mitigating circumstances as part of its process in deciding an appropriate sentence. Therefore, in Mississippi, unlike in Georgia, the finding of a statutory aggravating circumstance plays some role in guiding the sentencing body in the exercise of its discretion in addition to its function of narrowing the class of defendants convicted of murder who are eligible for the death penalty. Even if the jury determines that the statutory aggravating circumstances outweigh the mitigating circumstances, however, the jury is always entitled to return a sentence of life imprisonment.

We believe that the Mississippi capital punishment scheme, as applied in this case, passes constitutional muster for virtually the same reasons articulated by the Supreme Court in *Zant*. The jury in this case, like the jury in *Zant*, found the existence of three statutory aggravating circumstances and identified them in writing. On appeal, the Mississippi Supreme Court found that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence was sufficient to support the jury's findings on each statutory aggravating circumstance, and that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *Stringer*, 454 So.2d at 478-79.

The Supreme Court, in *Maynard*, determined that the "especially heinous, atrocious, or cruel" aggravating circumstance, when submitted for the jury's consideration without a limiting instruction, is constitutionally overbroad. The facts of this

#### C. Aggravating Circumstances

Relying on *Maynard v. Cartwright*, — U.S. —, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Stringer asserts that his death sentence should be set aside since the trial court failed to define the unconstitutionally overbroad "especially heinous, atrocious, and cruel" aggravating circumstance. The State maintains that our decision in *Edwards v. Scroggyn*, 849 F.2d 204 (5th Cir. 1988), forecloses Stringer's argument. In *Edwards*, the defendant-appellant argued that there was insufficient evidence to support one of the aggravating circumstances found by the jury and that, therefore, his death sentence should be vacated. This court, assuming for the sake of argument that the aggravating circumstance complained of was invalid, determined that the death sentence should stand. In so holding, the court distinguished the case before it from that presented in *Maynard*.

[*Maynard*] was remanded to the Oklahoma court to determine as a matter of state law whether the sentence should be set aside. Unlike Oklahoma law, however, Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain. *Edwards*, 849 F.2d at 211 n. 7 (citations omitted). Actually, the Supreme Court affirmed the Tenth Circuit's judgment which vacated the death sentence and remanded the cause to the state court for such further proceedings as it might wish to conduct.

The facts in *Maynard* are, however, distinguishable from those presented in *Edwards* and those presented here. In *Maynard*, the State advanced the argument that the death sentence should be upheld because there was a valid aggravating circumstance remaining. In rejecting this argument, the Supreme Court noted that at the time that *Cartwright's* case was decided, the Oklahoma Court of Criminal Appeals itself would not attempt to save a death penalty when one of the aggravating circumstances was found invalid, but instead would automatically impose a sen-

862 F.2d-26

tence of life imprisonment. Noting that, since *Cartwright's* conviction, the Oklahoma Court of Criminal Appeals had determined that it would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances was found invalid, the Court wrote that "[w]hat significance these decisions of the Court of Criminal Appeals have for the present case is a matter for the state courts to decide in the first instance." *Maynard*, 108 S.Ct. at 1860. By contrast, the Mississippi Supreme Court has held that a death sentence should be upheld even though an aggravating circumstance is found invalid or unsupported by the evidence, so long as at least one aggravating circumstance remains. See, e.g., *Lanier v. State*, 533 So.2d 473 (Miss. 1988) (en banc); *Johnson v. State*, 511 So.2d 1333, 1337 (Miss.1987), *rev'd on other grounds*, — U.S. —, 108 S.Ct. 1981, 100 L.Ed.2d 375 (1988); *Irring v. State*, 498 So.2d 305, 314 (Miss.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987); *Edwards v. State*, 441 So.2d 84, 92 (Miss.1983).

(6) There is another reason that *Maynard* does not control the disposition of this case. In *Maynard*, the Supreme Court did not directly address the specific issue confronting us here: Must a death sentence be vacated when one of the three statutory aggravating circumstances found by the jury is subsequently held to be invalid and the jury was instructed to weigh the statutory aggravating circumstances against all mitigating circumstances in determining an appropriate sentence? For the reasons given below, we conclude that it must not.

The Supreme Court, in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 253 (1983), addressed a similar issue involving Georgia's capital sentencing scheme. In *Zant*, a jury found the defendant guilty of murder. The court then instructed the jury at the sentencing phase of the trial that it must find one or more statutory aggravating circumstances in order to fix punishment at death, but that in determining the appropriate sentence, "the jury was authorized to consider all of the evidence

#### D. Lesser Included Offense

(7) Stringer next complains that the trial court erred in failing to instruct the jury on a lesser included offense of non-capital murder or manslaughter. This is a new complaint, but it has no merit. Stringer introduced no evidence on which the jury rationally could have found him guilty of a lesser offense and acquitted him of the greater offense. See *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 2386, 65 L.Ed.2d 392 (1980) (quoting *Keble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1933, 1995, 36 L.Ed.2d 844 (1973)). Under the evidence presented at trial, either Stringer led a gang of robbers with the intent to murder the two victims, or he was at home nursing a back pain.

#### IV. Assistance of Trial Counsel

##### A. Failure to Present Mitigating Evidence

Stringer asserts that his right to the effective assistance of counsel at trial was violated in that his trial counsel neither prepared nor presented a case in mitigation at the sentencing phase of the trial. The district court held an evidentiary hearing limited to the issues of the effectiveness of trial and appellate counsel and found that Stringer did receive effective assistance. Stringer's trial attorneys, Sam Wilkins and James Nelson, and Stringer's appellate counsel, Harry Kelly, testified at the hearing.

(8, 9) The United States Supreme Court articulated the standard by which we evaluate the effectiveness of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order for a convicted defendant's ineffective assistance claim to prevail, he must show both that counsel's performance was deficient and that the deficiency actually prejudiced his defense, thereby making the result of the trial unreliable. *Id.* at 687, 104 S.Ct. at 2064. Because it is all too easy for a reviewing court to conclude that a particular defense was unreasonable once that defense has proved unsuccessful, we give great deference to counsel's performance

That the jury was instructed to weigh statutory aggravating circumstances does not alter the federal decision. We see no difference, other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence. Had this jury been instructed as the jury was in *Zant*, it would have been constitutionally authorized to consider as aggravating all the facts and circumstances surrounding the crime—for instance, whether it believed the crime to be heinous, atrocious, or cruel—and to use those considerations in arriving at a sentencing decision. That it was not so instructed, that is, that the court limited its consideration to only statutory aggravating circumstances, is a matter of state law only. *Zant*, 103 S.Ct. at 2743 n. 17. We look to Mississippi to decide the impact of the invalid aggravating circumstance on Stringer's death sentence. Mississippi has held that the invalidation of an aggravating circumstance will not affect the death sentence so long as there is at least one valid aggravating circumstance remaining. Here, two valid aggravating circumstances remained. We overrule Stringer's argument.



and evaluate its reasonableness in light of the facts and circumstances as they appeared to exist at the time of trial. *Id.* at 689, 104 S.Ct. at 2065. Applying this standard to the facts before us, we conclude that Stringer received effective assistance at trial.

At the district court's hearing, Wilkins testified that he had spent the majority of his time preparing for the guilt phase of the trial and that he was "devastated" when the jury returned a guilty verdict. He testified further that he could not recall the details of what occurred between the announcement of the guilty verdict and the sentencing phase of the trial or how the decision was reached not to present mitigating evidence. Wilkins did state, however, that he had not formally investigated possible mitigating evidence since he already had personal knowledge of Stringer's background and friends.

Nelson, Wilkins' associate, testified that he and Wilkins conferred with Stringer following the conclusion of the trial's guilt phase, at which time they explained the purpose of the mitigation case and discussed which family members could testify. According to Nelson, Stringer told them in no uncertain terms that he did not want his family to testify in his behalf. Stringer did not testify at the hearing. It is now argued that even if Stringer forbade the use of family members as witnesses, he did not prohibit the use of other witnesses or other evidence.

[110] The failure to present a case in mitigation during the sentencing phase of a capital murder trial is not, *per se*, ineffective assistance of counsel. This court has often upheld decisions not to put on mitigating evidence where the decision resulted from a strategic choice. *See, e.g., Moore v. Maggio*, 740 F.2d 308, 315-16 (5th Cir. 1984), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985); *Lorenfield v. Phelps*, 817 F.2d 285, 291 (5th Cir.1987), *aff'd*. — U.S. —, 104 S.Ct. 546, 98 L.Ed. 2d 568 (1988).

[111] Stringer contends, however, that Wilkins made no strategic choice in this case and cites as proof Wilkins' statement

at the habeas proceeding that he had no reason based on sound trial strategy for not preparing and presenting certain witnesses for the sentencing decision. We disagree. In concluding that Stringer received effective assistance at trial, the district court apparently discredited much of Wilkins' testimony, which it was entitled to do. Furthermore, the district court had good reason to see Wilkins' decision not to present additional mitigating evidence as understandable strategy. We agree with the district court for the reasons originally given by the Mississippi Supreme Court upon the direct appeal. 454 So.2d at 475-78.

The jury, in returning a guilty verdict, showed what they thought of Stringer's alibi. They had found him guilty of a deliberate massacre of innocent human beings. The testimony of someone who had known and liked Stringer years ago was not going to lessen the impact of that evidence. Stringer's only hope was to get at least one juror to have enough misgiving regarding his guilt to block the death penalty. Wilkins attempted to do just that by arguing that he and his client had to accept the verdict of guilty but that any qualms a juror might have regarding Stringer's guilt should be resolved against imposing the death penalty. On the record before us, we are in no position to say that this was not the best that could be done for Stringer.

[112] Furthermore, Stringer has been unable to establish that he was prejudiced by trial counsel's performance. Stringer asserts that Wilkins should have presented evidence of his war record, his medical record, and his reputation as a businessman and family man in mitigation. Based on the State's evidence presented during the guilt phase, which the jury obviously believed, we cannot conclude that there is a reasonable probability that, but for Wilkins' failure to present this evidence, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

guilt, but also it would have sent the wrong message to the jury regarding Stringer's character and family commitment. Stringer has failed to demonstrate an actual conflict.

#### V. Assistance of Appellate Counsel

[118] Stringer next contends that he was denied effective assistance of counsel on appeal due to his appellate attorney's alleged conflict of interest. Harry Kelly took over representation of both Stringer and his son, Jimbo, following Stringer's conviction for murder. Stringer primarily urges in regard to this claim that Kelly rendered ineffective assistance of counsel because he failed to raise two issues in Stringer's appeal that he did raise in Jimbo's case. Those two issues were (1) the use of graphic photographs of the McWilliams and (2) the use of a facsimile riot gun.

Kelly testified at the hearing below that in conducting Stringer's appeal he had chosen to concentrate only on what he considered to be the strongest arguments for Stringer. The Supreme Court stated in *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)), that the "process of 'winnowing out' weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Stringer asserts, however, that Kelly did not, in fact, winnow out only the weaker arguments from Stringer's appeal. To support his contention, Stringer points to the two issues excluded from Stringer's appeal that were included in Jimbo's appeal and the additional points Kelly raised in the brief supporting Stringer's motion for rehearing filed with the Mississippi Supreme Court.

That Kelly could have raised additional points on appeal and that he did raise additional points in a motion for rehearing do not indicate that he did not "winnow out" the weaker arguments from Stringer's ap-

peal. When Kelly came into the case Stringer had been tried and the record had been made. Kelly could do no more than present those arguments that he believed worked most strongly in Stringer's favor.

Further, as the State points out and as the record reflects, Stringer did not have available to him the same arguments Kelly raised in Jimbo's behalf regarding the photographs and the riot gun. In Jimbo's trial for the murder of Ray McWilliams, the prosecutor displayed slides of Neil McWilliams to the jury during his closing argument. Later, on appeal, the Mississippi Supreme Court held that the introduction of the photographs into evidence was not reversible error, but that the display of the photographs during closing argument, when combined with other prosecutorial tactics, so prejudiced the jury that Jimbo could not have received a fair sentencing trial. *See Stringer v. State*, 500 So.2d 928, 934-35 (Miss.1986). One such tactic referred to was the prosecutor's argument that this was the jury's last chance to give Jimbo the death penalty since he had received a life sentence for Neil McWilliams' murder. This argument was not made in Stringer's trial.

Similarly, Kelly could not have made the same argument for Stringer with regard to the "facsimile riot gun"; that gun was never introduced at Stringer's trial. The State did introduce the .38 caliber pistol found in Stringer's boot when he was arrested. Kelly raised that point and the Mississippi Supreme Court addressed it on Stringer's direct appeal. *Stringer*, 454 So.2d at 475.

Stringer has not shown that an actual conflict of interest existed due to Kelly's representation of both Stringer and Jimbo. After a full evidentiary hearing, the district court concluded that Stringer had "been unable to present facts, and not mere inferences, to show that Kelly had an actual conflict of interest which rendered him ineffective." *Stringer*, 675 F.Supp. at 364. We agree.

#### VI. Photographs

[119] Finally, Stringer asserts for the first time on appeal that the admission of

#### B. Conflict of Interest

Stringer also asserts that his trial counsel was ineffective because he had a conflict of interest. Stringer bases his claim on the fact that Wilkins represented two other codefendants in addition to Stringer.

[112, 114] "Requiring or permitting a single attorney to represent codefendants ... is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978)). In order to prevail on such a claim, having made no objection at trial, Stringer must demonstrate that an actual conflict existed by pointing to specific instances in the record which reflect that Wilkins' performance in his behalf was adversely affected. *See Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 323 (1980); *United States v. Foz*, 613 F.2d 99, 102 (5th Cir.1980). Speculative or merely hypothetical conflicts do not implicate the Sixth Amendment right to the effective assistance of counsel. *Baty v. Bulcom*, 661 F.2d 391, 395 (5th Cir. Unit B Nov. 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); *Fozworth v. Wainwright*, 516 F.2d 1072, 1077 n.7 (5th Cir.1975). The petitioner must specifically identify instances in the record that reflect that his counsel "made a choice between possible alternative courses of action such as eliciting (or failing to elicit) evidence, helpful to one client but harmful to the other." *United States v. Merz*, 701 F.2d 1321, 1328 (11th Cir.) (quoting Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J.Crim.L. & Criminology 226, 232 (1977)), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). Stringer has not made that showing here.

[115] Stringer contends that Wilkins' representation of both himself and his son and codefendant, Jimbo Stringer, was an obvious actual conflict of interest because, under the State's theory, Jimbo was targeted as a triggerman while Stringer was not. These facts alone do not establish an actual

conflict of interest. Stringer's defense was alibi, and all three of Wilkins' clients told the same story. At the time that Wilkins undertook the representation of the codefendants, he told them that if they all were telling the truth he would have no conflict of interest, but that if they had in fact committed the charged crime then he would have a conflict of interest. All three stood by their stories, as did the other alibi witnesses who spoke with Wilkins. Stringer did not contradict Wilkins' testimony regarding this discussion at the hearing, and the district court accepted Wilkins' testimony as true.

[116] Stringer next alleges that an actual conflict is evident based on the prosecution's reference in closing argument to five of the six defense witnesses as "Sam's Army." Each of those five witnesses had testified that Sam Wilkins represented him or her. The prosecution, in an attempt to discredit the witnesses, stated during argument that one of the many unanswered questions in the case was why all of these witnesses chose Sam Wilkins as their lawyer. Stringer argues that Wilkins' readiness to represent so many people involved in the case that the prosecutor could get away with referring to the defense witnesses collectively as "Sam's Army" worked to his detriment in that Wilkins never discussed other possible defenses that might be raised in Stringer's behalf. But that suggests no conflict; no other defenses were discussed for the simple reason that this defense, assuming its truth, was the only defense for all of his clients.

[117] Stringer also claims that Wilkins' performance reflected a conflict of interest at the trial's sentencing phase. He asserts that Wilkins should have argued to the jury that even under the State's theory of the case, he was not the triggerman who actually killed Neil McWilliams. To make such an argument would have shown Stringer's willingness to lay the blame for the murder on his own son in order to save himself. Wilkins testified that "even in retrospect" he would not have made this argument. Not only would it have undermined any doubt the jurors had regarding Stringer's

certain photographs of the murder scene violated his due process rights. Stringer did not present this claim to the district court and therefore we need not consider it on appeal. *See Willic*, 737 F.2d at 1387-88 n.20. Furthermore, the evidence clearly does not offend constitutional due process.

The stay of sentence is vacated. The judgment of the district court denying the writ is AFFIRMED.

JOHNSON, Circuit Judge, dissenting.

It cannot be stated often enough that "death is qualitatively different from other punishments that can be imposed by the state." *Cartwright v. Maynard*, 822 F.2d 1477, 1483 (10th Cir.1987) (en banc), *aff'd*. — U.S. —, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Because of the finality attendant with the punishment of death, it is critical that the process by which a criminal defendant is sentenced to death not be one tainted by error which could result in the imposition of the death sentence in a manner inconsistent with constitutional guarantees. In the instant case, an error of constitutional magnitude flawed the decision of the jury to sentence defendant James Stringer to death. Specifically, the jury was permitted to consider an constitutionally vague statutory aggravating circumstance during its sentencing deliberations, deliberations which involved the balancing of statutory aggravating and mitigating circumstances. Further, the improper consideration by the jury of the invalid aggravating circumstance was not cured on appeal by the Mississippi Supreme Court. Moreover, the unconstitutionally vague aggravating circumstance was vigorously argued to the jury by the prosecutor as a justification for imposing the death sentence on Stringer. Today, a majority of this panel concludes that the above error does not necessitate a resentencing of Stringer. Persuaded that the eighth and fourteenth amendments to the Constitution demand the reversal of Stringer's death sentence which was imposed pursuant to a sentencing determination that included the consideration by the jury of an unconstitutional statutory aggravating circumstance

Pursuant to this process, the jury in the instant case found three statutory aggravating circumstances and, pursuant to the balancing analysis described above, sentenced Stringer to death. Specifically, the jury found the following three statutory aggravating circumstances in Stringer's case: (1) that the murder was intentional and committed while engaged in an attempt to commit robbery for pecuniary gain; (2) that the murder was committed for the purpose of avoiding or preventing detection and lawful arrest; and (3) that

Pursuant to this process, the jury in the instant case found three statutory aggravating circumstances and, pursuant to the balancing analysis described above, sentenced Stringer to death. Specifically, the jury found the following three statutory aggravating circumstances in Stringer's case: (1) that the murder was intentional and committed while engaged in an attempt to commit robbery for pecuniary gain; (2) that the murder was committed for the purpose of avoiding or preventing detection and lawful arrest; and (3) that



the murder was especially heinous, atrocious, or cruel. On appeal, Stringer challenges the constitutionality of the "especially heinous" aggravating circumstance, asserting that the aggravating circumstance is unconstitutionally vague.

Last term, the Supreme Court addressed the constitutionality of the especially heinous aggravating circumstance as applied under Oklahoma law in *Maynard v. Cartwright*, — U.S. —, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), explaining the concept of vagueness in the context of capital punishment in the following manner:

Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972).

108 S.Ct. at 1858.

In *Maynard*, as will be discussed in greater detail subsequently, the Supreme Court held that the especially heinous aggravating circumstance as applied by the Oklahoma courts was unconstitutionally vague. *Id.* at 1859. In the instant appeal Stringer relies on the *Maynard* decision in seeking a reversal of his death sentence. The majority today nevertheless concludes that Stringer's claim in this regard is foreclosed by the recent decision of this Court in *Edwards v. Scroggys*, 849 F.2d 204 (5th Cir.1988), *petition for cert. filed*, — U.S. L.W. — (U.S. Oct. 18, 1988).

In *Edwards*, a Mississippi capital murder case, the defendant Edwards was sentenced to death after the jury found six statutory aggravating circumstances. The *Edwards* Court, in rejecting a claim that the invalidation of one of the six statutory aggravating circumstances necessitated a resentencing of Edwards, relied on the holding by the Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), that "the invalidation of

one aggravating circumstance [does] not require the vacation of the death penalty so long as there [are] other valid aggravating circumstances remaining." *Edwards*, 849 F.2d at 211. The *Edwards* Court, addressing the impact of the recent decision of the Supreme Court in *Maynard*, then reasoned that the *Maynard* decision was distinguishable for the reason that the Oklahoma law reviewed in *Maynard* was unclear regarding the effect of the invalidation of one aggravating circumstance on the validity of a death sentence. The *Edwards* Court thereafter, in contrast, stated "Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain." *Edwards*, 849 F.2d at 211 n. 7 (citation omitted). Thus, relying on the above distinction of the *Maynard* decision, the *Edwards* Court refused to vacate Edwards' death sentence.

The *Edwards* opinion, as stated by the majority, now constitutes Circuit precedent; nevertheless, I feel compelled to address what I perceive to be an important issue left unaddressed by this Court in *Edwards* and one which was purposefully reserved by the Supreme Court in *Zant*—that issue being the effect on the validity of a death sentence of a holding that "a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Zant*, 462 U.S. at 890, 103 S.Ct. at 2749.

In *Zant v. Stephens*, the Supreme Court concluded that the validity of a death sentence based in part on the consideration by the jury of an invalid aggravating circumstance "depends on the function of the jury's finding of an aggravating circumstance under [a state's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue . . . was found to be invalid." *Id.* at 864, 103 S.Ct. at 2736. See also *Cartwright v. Maynard*, 822 F.2d 1477. In *Zant*, the Supreme Court addressed the validity of a death sentence

imposed pursuant to Georgia law under circumstances where the jury, in sentencing the defendant Stephens to death, was permitted to consider a statutory aggravating circumstance subsequently declared invalid by the Georgia Supreme Court. In its analysis of *Zant*, the Supreme Court initially noted that the function of a jury's finding of an aggravating circumstance under the Georgia capital sentencing scheme is to narrow the class of individuals eligible to receive the death penalty. In this regard, as long as one aggravating circumstance is found by the jury, the threshold dividing murderers in Georgia that are eligible for the death penalty and those murderers that are not so eligible, is crossed. *Zant*, 462 U.S. at 870-72, 103 S.Ct. at 2739-40. Significantly, the *Zant* Court noted that a function which an aggravating circumstance does not serve under the Georgia statute is that of guiding the discretion of the sentencer in deciding whether to impose life imprisonment or death. *Id.* at 874, 103 S.Ct. at 2741. Georgia, unlike other states, does not instruct its juries "to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 873-74, 103 S.Ct. at 2740-41.

After noting the function, as described above, of an aggravating circumstance under the Georgia capital scheme, the Supreme Court in *Zant* concluded that the existence of two valid aggravating circumstances served the constitutional requirement of narrowing the class of persons eligible for the death penalty despite the consideration by the jury of a third aggravating circumstance—that the defendant had "a substantial history of serious assaultive criminal convictions"—which had been declared unconstitutionally vague. *Id.* at 879, 103 S.Ct. at 2744. Thus, concluding that the defendant Stephens had already crossed the threshold into the class of individuals eligible for the death penalty by virtue of the two valid statutory aggravating circumstances found by the jury, the Supreme Court determined that the jury's

consideration of the invalid statutory aggravating circumstance in deciding whether to actually impose the death penalty did not amount to constitutional error. The Supreme Court stated that "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death." *Id.* at 878, 103 S.Ct. at 2743. Thus, despite recognizing the possibility that the labelling of the invalid aggravating circumstance as statutory in Stephens' case might have caused the jury to afford that circumstance greater weight in its sentencing deliberations, the Supreme Court determined the death sentence to be constitutionally valid. *Id.* at 888-89, 103 S.Ct. at 2748-49.

At this point, some observations regarding the *Zant* decision which are important to the instant appeal by Stringer must be made. First, the Supreme Court, in upholding Stephens' death sentence, relied in part on the meaningful appellate review conducted by the Georgia Supreme Court in capital cases to insure that the death penalty is not imposed in a disproportionate, arbitrary, or capricious fashion. *Id.* at 890, 103 S.Ct. at 2749. Additionally, and of considerable import, is the fact that the Supreme Court in *Zant* established that the function of an aggravating circumstance in a capital scheme is critical to the validity of a death sentence imposed pursuant to the consideration by the sentencer of an invalid aggravating circumstance. In this regard, the Supreme Court in the final paragraph of its opinion in *Zant*, purposefully declined to intimate an opinion as to the following issue:

Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

*Id.* at 890, 103 S.Ct. at 2750.

Recently, in the Tenth Circuit's en banc treatment of *Cartwright v. Maynard*, that

court confronted the above question reserved by the Supreme Court in *Zant* regarding the effect of an invalid aggravating circumstance on the validity of a death sentence imposed pursuant to a capital sentencing scheme under which a jury is required to balance statutory aggravating and mitigating circumstances in exercising its discretion to impose the death penalty. *Maynard*, 822 F.2d 1477. In the Tenth Circuit's en banc *Maynard* opinion, a case in which the court was reviewing the validity of a death sentence imposed under Oklahoma law, the Tenth Circuit engaged in an extensive discussion of the Supreme Court's pronouncements addressing the effect of a jury's consideration of an invalid aggravating circumstance on the validity of a death sentence. The Tenth Circuit *Maynard* court observed that the Supreme Court decisions in this area "leave open the question of whether a sentencing authority that must weigh all statutory factors [aggravating and mitigating] may consider constitutionally invalid aggravating circumstances." *Maynard*, 822 F.2d at 1482 (quoting Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1629, 1681 (1984)). In resolving the above question in *Maynard*, the Tenth Circuit applied the language of the Supreme Court in *Zant* regarding the function of an aggravating circumstance under a capital scheme and the reason a particular aggravating circumstance is invalid.

On the function of an aggravating circumstance under Oklahoma law, the en banc *Maynard* court stated that "[t]he purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in *Zant*." *Id.* at 1480. Pursuant to Oklahoma law, any first degree murder is eligible to be classified as a capital murder and thus, the purpose of an aggravating circumstance under the Oklahoma capital sentencing scheme is not to narrow the class of persons eligible to receive the death penalty. Instead, "Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining

independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [an invalid aggravating circumstance]." *Goode*, 464 U.S. at 86-87, 104 S.Ct. at 383-84.

In *Maynard*, the Tenth Circuit distinguished the defendant Cartwright's case from that of the invalid aggravating circumstances at issue in *Barclay* and *Goode* on the basis that the invalid aggravating circumstance in Cartwright's case—the identical "heinous, atrocious, or cruel" circumstance at issue in the instant appeal by Stringer—was invalid not under state law, but under federal constitutional law. *Maynard*, 822 F.2d at 1480. Further, the Tenth Circuit in *Maynard* noted that Oklahoma courts do not provide for a method of appellate review whereby the Oklahoma appellate courts may independently reweigh only the valid aggravating and mitigating circumstances in a capital case so as to cure on appeal a sentencer's consideration of an invalid aggravating circumstance. *Id.*

On the basis of the above observations regarding the function of an aggravating circumstance in Oklahoma and the reason the especially heinous aggravating circumstance was invalid, the Tenth Circuit ultimately concluded that:

[R]eliance upon an aggravating circumstance that is invalid under the federal constitution could affect the balance struck by the sentencer. The improper reliance is not corrected by the state appellate review process and is not a matter of state law beyond the review of a federal court in a habeas corpus proceeding. A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments. We therefore must consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was unconstitutionally vague.

*Id.* at 1482-83. After reaching the above conclusion, the Tenth Circuit then proceed-

ed to hold that the especially heinous aggravating circumstance as applied pursuant to Oklahoma law was in fact unconstitutionally vague under the Federal Constitution. *Id.* at 1483-91. The Tenth Circuit reasoned that it was therefore presented with the question of whether or not the court could sua sponte apply a limiting construction of the especially heinous aggravating circumstance to the facts of Cartwright's case so as to cure any error by the jury in considering the unconstitutional aggravating circumstance. Observing that Oklahoma had adopted no such limiting construction, the Tenth Circuit determined that the fashioning of such a saving construction must be made by the State in the first instance and accordingly, remanded Cartwright's case to the state courts for a redetermination of his sentence. *Id.* at 1492.

Thereafter, the Supreme Court, reviewing the en banc decision of the Tenth Circuit in *Maynard*, affirmed the holding by the Tenth Circuit that the language of the especially heinous aggravating circumstance was unconstitutionally vague under the eighth and fourteenth amendments. *Maynard*, — U.S. —, 108 S.Ct. at 1859. However, the Supreme Court did not comment on the further conclusion by the Tenth Circuit that a death sentence imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the eighth and fourteenth amendments. Instead, the Supreme Court in *Maynard*, recognizing, as did the Tenth Circuit, that Oklahoma had no provision for curing the consideration of an invalid aggravating circumstance on appeal, remanded Cartwright's case to the Oklahoma state courts for a redetermination of the appropriate sentence. In this regard, the Supreme Court stated that:

It is true that since the decision of the Court of Appeals, the Oklahoma Court of Criminal Appeals has restricted the heinous, atrocious, or cruel aggravating circumstance to those murders in which torture or serious physical abuse is present. At the same time, that court decided that it would not necessarily set aside a death



penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence.

What significance these decisions of the Court of Criminal Appeals have for the present cases is a matter for the state courts to decide in the first instance.

*Maynard*, — U.S. —, 106 S.Ct. at 1860 (citations omitted).

Turning to the facts of the case sub judice, it is observed that the function of an aggravating circumstance under the Mississippi capital sentencing scheme constitutes a hybrid between that of the function of the aggravating circumstance under the Georgia capital scheme reviewed in *Zant* and the aggravating circumstance under the Oklahoma capital scheme reviewed in *Maynard*. Under the Mississippi scheme, a statutory aggravating circumstance serves not only to narrow the class of persons eligible for the death penalty, but also to guide the discretion of the sentencer in deciding whether or not to impose the death penalty. Regarding the latter, as required of a jury in Oklahoma, a jury in Mississippi is required to weigh statutory aggravating circumstances against mitigating circumstances in deciding whether to

1. The majority opinion points to the fact that the Mississippi Supreme Court, on appeal, reviews whether or not a sentence of death is imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence is sufficient to support the jury's finding on each statutory aggravating circumstance; and whether the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *Majority Opinion* at slip opinion p. 1393, at p. 1114. This type of appellate review, however, is not sufficient to cure on appeal the consideration by a sentencer of an invalid aggravating circumstance in weighing statutory aggravating and mitigating circumstances to determine whether or not to impose the death penalty on a particular defendant. Rather, as recognized by the U.S. Supreme Court in *Wainwright v. Goode*, the type of appellate review which would have a curative effect in such a situation is that review pursuant to which an appellate court independently rebalances only the valid aggravating circumstances found by the sentencer against the mitigating circumstances to determine if the death sentence is valid. *Goode*, 404 U.S. at 86-87, 104

impose the death penalty once a defendant has been convicted of a capital offense. Miss. Code Ann. § 99-19-103 (Supp. 1987). Thus, like the aggravating circumstance in Oklahoma, the aggravating circumstance in Mississippi's capital sentencing scheme "plays a critical role in guiding the discretion of the sentencer" in determining whether an individual defendant is sentenced to life or death. Further, as in Oklahoma, Mississippi provides no method for curing on appeal the improper consideration by a sentencer of an unconstitutional aggravating circumstance.<sup>1</sup> As a result, reliance on an unconstitutional aggravating circumstance by a jury in Mississippi could affect the delicate balance struck by the sentencer in deciding whether or not to impose the death penalty. I am persuaded, therefore, that this Court, like the Tenth Circuit in *Maynard*, must consider Stringer's assertion that the "heinous, atrocious, or cruel" circumstance as applied under Mississippi law is unconstitutionally vague.

On this question, it is noted that, in light of the recent holding by the Supreme Court in *Maynard* that the especially heinous aggravating circumstance is facially unconstitutional, any further inquiry in this area is limited to determining whether or not Mississippi applies a limiting construction of the especially heinous aggravating circumstance.

S.Ct. at 383-84. In fact, in *Cartwright v. Maynard*, the Tenth Circuit en banc rejected the proportionality review conducted by the Oklahoma Court of Criminal Appeals in that case as a justification for upholding the validity of the death sentence where the sentencer considered an unconstitutional aggravating circumstance. In doing so, the Tenth Circuit noted that Supreme Court decisions do not in any manner suggest "that a proportionality review [can] serve as an independent basis for upholding a death sentence imposed after reliance upon an unconstitutional aggravating circumstance." *Cartwright*, 822 F.2d at 1461 n. 3.

Therefore, since Mississippi, like Oklahoma, does not provide a method for curing on appeal the improper consideration by a sentencer of an unconstitutional aggravating circumstance, the appellate review which was conducted by the Mississippi Supreme Court of Stringer's death sentence in the instant case cannot cure the jury's reliance upon the unconstitutional especially heinous aggravating circumstance in arriving at its decision to sentence Stringer to death.

which was later determined to be invalid. In rejecting a harmless error analysis under the facts of the *Johnson* case, the Mississippi Supreme Court relied on the fact that the "district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." *Id.* This decision by the Mississippi Supreme Court to refrain from applying a harmless error analysis was cited with approval last term by the Supreme Court in *Johnson v. Mississippi*, — U.S. —, 108 S.Ct. 1981, 1989 n. 8, 100 L.Ed.2d 575 (1988).

In the instant case, as in *Johnson*, the prosecutor vigorously argued as a justification for imposing the death sentence on defendant James Stringer the fact that the instant crime was especially heinous, atrocious, and cruel. In this regard, the prosecutor stressed repeatedly to the jury that if they should find only one aggravating circumstance to outweigh any mitigating circumstances, then the verdict should be the death penalty. Proceeding in such a fashion, the prosecutor then apparently showed photographic slides of the crime to the jury, describing in detail the facts of the murders and asking of the jury "Is that atrocious? Is that cruel?" This argument by the prosecutor certainly raises a question as to whether, under Mississippi law, Stringer would be entitled to a resentencing due to the jury's consideration of the unconstitutionally vague especially heinous aggravating circumstance. Moreover, it is highly suspect that the Mississippi capital sentencing scheme continues to channel the sentencer's discretion by "clear and objective standards" where an unconstitutionally vague aggravating circumstance is vigorously argued to the jury as a justification for imposing the death penalty. See *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980). Therefore, contrary to the conclusion reached by the majority today, this Court's decision in *Edwards* does not foreclose Stringer's request for habeas corpus relief in the instant appeal. Mississippi law is not well settled on the aspect of a jury's consideration of an invalid aggravating circumstance in a capital sentencing proceeding where that circumstance has been vigorously argued to the jury as a basis for the death penalty. Accordingly, I would remand the instant proceeding to the state courts for a redetermination of Stringer's sentence.

As a final note, I would harken back to the previously mentioned fact that this Court has consistently declined to recognize or address the vital issue of the effect on the validity of a death sentence of a jury's consideration of an unconstitutional aggravating circumstance pursuant to a capital sentencing scheme which requires a sentencer to balance all statutory aggravating circumstances against all mitigating circumstances in deciding whether or not to impose the death penalty. For the reasons set forth by the Tenth Circuit in its en banc opinion in *Maynard* and discussed more fully above, I would conclude, and urge this Court to also conclude, that the consideration of an unconstitutional aggravating circumstance under a capital sentencing scheme which requires a jury to balance aggravating and mitigating circumstances and which is not effectively cured on appeal must be vacated under the eighth and fourteenth amendments. It is absolutely imperative that a death sentence not be imposed pursuant to a sentencing process which fails to protect against the imposition of our most severe and final punishment in an arbitrary or capricious fashion.



Carl Eugene KELLY,  
Petitioner-Appellant,  
v.  
James A. LYNNAUGH, Director, Texas  
Department of Corrections,  
Respondent-Appellee.

No. 57-1520.  
United States Court of Appeals,  
Fifth Circuit.  
Dec. 22, 1988.

Murder defendant under sentence of death filed federal habeas corpus petition.

stance in reviewing a death sentence on appeal. In this connection, this Court, in *Johnson v. Thigpen*, 806 F.2d 1243, noted that the Mississippi Supreme Court, in *Coleman v. State*, 378 So.2d 640 (Miss. 1979), had indeed adopted a limiting construction of the especially heinous aggravating circumstance to be applied in conducting appellate review of death sentences. However, in reviewing Mississippi's actual application of the limiting construction adopted in *Coleman*, this Court in *Johnson* concluded that:

[T]he Mississippi Supreme Court has not consistently applied its *Coleman* limiting construction of the especially heinous aggravating circumstance. The limiting construction we found in *Gray* [v. *Luna*, 677 F.2d 1086 (5th Cir. 1982)] had been adopted in *Coleman* appears now to be more honored in breach than observance.

*Johnson*, 806 F.2d at 1247. Despite recognizing that the Mississippi Supreme Court no longer applies a limiting construction to the especially heinous aggravating circumstance, this Court upheld the death sentence imposed in *Johnson* as constitutionally permissible on the basis that the remaining valid aggravating circumstances serve the constitutional requirement of narrowing the class of persons eligible for the death penalty under the Mississippi capital sentencing scheme. *Id.* at 1248. Further, the Court in *Johnson* concluded that even if error was present due to the broadened construction of the especially heinous aggravating circumstance, it was error under Mississippi, and not federal law, and thus, an error of state law not cognizable on habeas corpus review. *Id.* at 1249.

Since *Johnson*, however, the Supreme Court has decided *Maynard v. Cartwright*. *Maynard* now teaches that the especially heinous aggravating circumstance is unconstitutionally vague in violation of federal, not state law. Therefore, any error in this regard is cognizable by this Court on habeas corpus review. Moreover, as observed by this Court in *Johnson*, the Mississippi courts no longer apply a limiting construction to the especially heinous aggravating circumstance to cure on appeal the sentencer's reliance on an unconstitutional

Returning full circle to the point first noted by this dissent, this Court is now bound by the recently issued opinion of this Court in *Edwards v. Scroggy*, which rejected *Maynard* as a basis for habeas corpus relief concluding that Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain. Setting aside for the moment the fact that the *Edwards* Court did not address the critical issue of the validity of a death sentence imposed pursuant to a balancing which includes consideration of an unconstitutional aggravating circumstance, the *Edwards* ruling does not foreclose Stringer's argument on this issue in the instant appeal. Stringer's argument is not foreclosed due to the fact that Mississippi law has created at least one exception to the general rule stated in *Edwards* regarding the effect of a sentencer's consideration of an invalid aggravating circumstance on the validity of a death sentence. Specifically, the Mississippi Supreme Court has, at least on one occasion, stated that it would "eschew" a harmless error analysis in a situation where a prosecutor has argued an invalid aggravating circumstance to a jury as a justification for imposing the death penalty. *Johnson v. State*, 511 So.2d 1333, 1338 (Miss. 1987), *rev'd on other grounds*, — U.S. —, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). In *Johnson*, the prosecutor argued to the jury as a justification for imposing the death penalty a previous conviction of *Johnson*

penalty a previous conviction of *Johnson*

The District Court for the Western District of Texas, James R. Nowlin, J., denied the writ, and petitioner appealed. The Court of Appeals held that: (1) defendant's right to terminate questioning was scrupulously honored and thus he was not denied his right against self-incrimination; (2) petitioner voluntarily waived his right to remain silent; (3) petitioner failed to show he was denied effective assistance of counsel; and (4) venireman was properly excused from jury.

4. Criminal Law — 641.13(2) Murder defendant whose trial counsel was allegedly ineffective in failing to request charge on mitigation of punishment due to voluntary intoxication failed to show any resultant prejudice in a case in which the evidence might have been a "double-edged sword," and in which the decision thus involved judgment call by trial counsel. U.S.C.A. Const.Amend. 6.

5. Habeas Corpus — 90.2(3) District court was not required to hold evidentiary hearing to determine whether federal habeas petitioner's trial counsel's failure to request charge on mitigation was due to ineffectiveness absent petitioner's allegation of facts which, if proved, would overcome presumptions that trial counsel was effective and that trial conduct was the product of reasoned strategy decisions. U.S.C.A. Const.Amend. 6.

6. Criminal Law — 641.13(7) Petitioner was not denied effective assistance of counsel by appellate counsel's failure to raise admissibility of confession on appeal where petitioner suffered no prejudice because the en banc Texas Court of Criminal Appeals specifically reviewed confession issue. U.S.C.A. Const.Amend. 6.

7. Homicide — 357(4) Even if evidence of murder defendant's voluntary intoxication could be considered mitigating, it could clearly be given full effect by jury in deciding whether defendant acted deliberately, and thus did not support defendant's attack on constitutionality of Texas capital punishment scheme which allegedly was flawed because it prevented jury from considering mitigating evidence except on issues of deliberateness of murder and probability of future dangerousness.

8. Jury — 108 Venireman whose answers to questions during voir dire indicated he would not vote to impose death penalty, no matter what the evidence was, was properly excused from capital murder trial.

9. Criminal Law — 412.1(4) Murder defendant's *Miranda* rights were scrupulously honored by police; interrogation ceased immediately each time defendant expressed desire to remain silent; police efforts to question defendant were spread over 7 to 12 hours, and oral warnings were administered twice and written warnings once, while fact that interrogation covered same crime did not indicate that police improperly persisted in repeated efforts to wear down defendant's resistance and make him change his mind. U.S.C.A. Const.Amend. 5.

10. Habeas Corpus — 85.1(2) Finding that murder defendant voluntarily waived the rights of which he was advised, including his right to remain silent, was supported by the record and thus entitled to a presumption of correctness on federal habeas review. 28 U.S.C.A. § 2254(d).

11. Criminal Law — 641.13(2) Murder defendant failed to show that his trial counsel was ineffective in not objecting to trial court's failure to instruct jury on "illegally obtained evidence," presumably his confession, where the court had instructed jury that it had to find that confession was given voluntarily and that defendant had waived his rights voluntarily in order to consider confession in compliance with Texas law. *Vernon's Ann. Texas C.C.P. art. 38.22, § 7; U.S.C.A. Const. Amend. 6.*